

Nguyen (Migration) [2018] AATA 4339 (27 September 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Thi Cam Nhung Nguyen

VISA APPLICANT: Mr Manh Tuan Dao

CASE NUMBER: 1614645

DIBP REFERENCE(S): 2015071190

MEMBER: Carmel Morfuni

DATE: 27 September 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:

- cl.300.21 of Schedule 2 to the Regulations
- cl.300.22 of Schedule 2 to the Regulations

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September 2018 at 1:21pm

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Statement made on 27

CATCHWORDS

MIGRATION – Prospective Marriage (Temporary) (Class TO) visa – Subclass 300 (Prospective Marriage) – genuine relationship – sponsor’s travel history – notice of intention to marry – reside in sponsor’s home – frequent communication – best interest of youngest child – evidence by sponsor’s mother – delay in marriage – proposed date of marriage – engagement ceremony – intention to work together – photographs of social events – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2 cls 300.211, 300.213, 300.214, 300.215, 300.216, 300.221, 300.222

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant **applied for the visa on 16 September 2015**. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include clause 300.215 and 300.216 at the time of application and 300.221 at the time of decision as set out below:
 3. **300.21 criteria to be satisfied at time of application**
 4. *300.215 the applicant establishes:*
 5. *(a) that the parties genuinely intend to marry and*
 6. *(b) that the marriage is intended by the parties to take place within the Visa period*
 7. *300.216 the Minister is satisfied that the parties genuinely intend to live together as spouses*
 8. **300.22 criteria to be satisfied at time of decision**
 9. *300.221 the applicant continues to satisfy the criteria in clause 300.211 and clauses 300.214, 300.215 and 300.216*
10. The delegate refused to grant the visa on 30 August 2016 on the basis that the visa applicant did not satisfy cl.300.215 and cl.300.216 and therefore cl.300.221 of Schedule 2 to the Regulations because the delegate was not satisfied that the relationship was seen as long-term by the parties and that the circumstances did not support an intention to live together in a genuine long-term relationship. The delegate concluded that the parties did not genuinely intend to live together as spouses pursuant to Section 5F of the Act and therefore the applicant did not meet the requirements of cl 300.215 and cl 300.216 Schedule 2 of the regulations.
11. The review applicant appeared before the Tribunal on 25 September 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor by telephone from Vietnam and the sponsor's mother Mrs.Thi Tuyet PHAM at the hearing. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
12. The review applicant was represented in relation to the review by her registered migration agent Ms. Dai VO

13. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in the present case is that the parties genuinely intend to marry and that the marriage is intended by them to take place within the visa period and that the parties genuinely intend to live together as spouses under section 5F of the Act in that they have a mutual commitment to a shared life, a genuine and continuing relationship and live together or do not live separately and apart on a permanent basis both at the time of application and the time of decision.

15. Summary of oral evidence

16. Sponsor's travel to Vietnam

17. The review applicant (sponsor) met the applicant on 27 March 2015. Since then she has travelled to Vietnam several times during 2015, 2017, 2018 and at other times which she could not remember. On several of those trips she travelled with one or both of her children, her mother, brother and sister nephew and niece or a combination of them. In answer to a question from the Tribunal as to why she did not marry the applicant in Vietnam during one of her many visits there, she stated that her then migration advisor had advised her not to do so. The visa applicant (applicant) provided a similar reason.
18. In answer to a question from Tribunal, the sponsor indicated that both her previous sponsorships in 1998 and 2007 resulted in marriage and resulted in visas being granted to both applicants, both relationships resulting in divorce.
19. The applicant has an 11-year-old daughter in Vietnam who lives with her mother. He is also the biological father of the sponsor's youngest child. The sponsor's daughter from her last marriage lives with the sponsor.

20. Details of the proposed future marriage

21. In relation to the most recent notice of intention to marry (NOIM) confirmation, the date of marriage celebration is set for 20 April 2019 at a restaurant in Springvale. When asked by the Tribunal where the actual ceremony was to be held the sponsor was evasive and obfuscating and eventually reluctantly said that she had decided to include the celebrant at the restaurant celebration and that that is where the marriage ceremony would be held. She stated that there would be around 30 people comprising mainly family as she did not want a large celebration. The applicant gave similar evidence.

22. Living arrangements in Australia

23. Both parties confirmed that they would live in the sponsor's home. At first they each indicated that there were five bedrooms in the house which was then changed to three when the Tribunal showed the sponsor her sponsorship application where she had stated that there were three bedrooms in the home and did not mention any other rooms in the document. She then stated in oral evidence that the two other rooms were storage areas.

24. The sponsor indicated that once the applicant arrived in Australia, one of the storage areas would be converted to her older daughter's bedroom. The people currently living in the sponsor's home and occupying bedrooms are the sponsor and her two daughters who share a bedroom, the sponsor's mother alone and the sponsor's nephew, his wife and their child. The applicant appeared to have little knowledge of any plans regarding accommodation after he arrives other than he would be living with the sponsor. He also stated that he loved the sponsor.
25. The sponsor said that the applicant would move into her bedroom when he arrived but otherwise there was no clear plan relating to the living arrangements but this would be reviewed depending on when her nephew eventually moved out of the home
26. The sponsor indicated, in answer to a question from Tribunal, that the parties speak almost every day and that she is a hairdresser running her own business. She advised that the applicant is also a hairdresser and would join her in the business.
27. The sponsor stated that she is miserable, her mother is around 80 years old and is not well and that her mother's memory is adversely affected, that the sponsor needs the applicant and needs assistance to help with her children especially now that her mother is not well. She stated that her younger child needs her father, the applicant.
28. The Tribunal asked both parties some questions about the sponsor's older child including her age, the school she attends and her interests. The applicant did not know the name of the school indicating that it was close to the sponsor's work. He indicated that the child likes to play games on the telephone. The sponsor had indicated to the Tribunal that the child's greatest interest was watching YouTube.
29. ***Oral evidence of the sponsor's mother, Thi Tuyet PHAM***
30. The sponsor's mother stated that she wants the applicant to come to Australia in order for the children to have a father. In addition she said that there was a break-in in their home about 12 months ago and that she is now very scared and her memory is affected.

Does the visa applicant intend to marry an eligible person?

31. *Clause 300.211* requires that at the time of application (16 September 2015) the visa applicant intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. The sponsor is an Australian Citizen (certificate provided). The oral evidence indicates that the parties did not fulfil their intention to marry pursuant to the first confirmation by the civil celebrant dated 19 August 2015 of their intention to marry on 13 October 2016 (the first NOIM). The parties provided a joint written statement dated 24 August 2015 indicating that they intended to marry however that marriage did not occur as the circumstances changed and based on the advice of their then migration agent.
32. Since then, a number of factors have influenced the progress of this matter. In oral evidence, the applicant stated that once they found out that the sponsor was pregnant, they decided to lodge the second confirmation notice of intention to marry, outlining their marriage plans. In addition, the evidence indicates that the sponsor

has travelled several times to Vietnam with the children, her mother and other relatives enabling the applicant to meet with the children and spend time together. It seemed to the Tribunal, that they had always intended to marry but the final impetus came when the sponsor became pregnant and further when they had a child. A DNA test dated 20 February 2017 indicates that the applicant is the father of the sponsor's youngest child born in early February 2016.

33. As indicated, when asked by the Tribunal why they had did not marry in Vietnam during the various visits by the sponsor, after lodging the first NOIM, they indicated that that was based on the advice of their then migration agent. Whilst the Tribunal has some concerns relating to this explanation and some concerns about the reasons given for the delay in the parties being married the Tribunal accepts that there may be a number of reasons why marriages do not take place sooner rather than later.
34. Accordingly, the Tribunal is satisfied that the requirements of cl.300.211 are met.

Is the visa applicant sponsored as required?

35. *Clause 300.213* requires that at the time of application the visa applicant is sponsored by the review applicant, and that the review applicant has turned eighteen. The sponsor is an Australian citizen (proofs provided) aged over eighteen at the date of application and the sponsorship is still in force (*Clause 300.222*).
36. *Clause 300.222* requires that the sponsorship referred to in cl.300.213 has been approved and is still in force. As the sponsorship is still in force r.1.20J (serial sponsorship), r.1.20KA (split applications in the parent visa stream), r.1.20KB (registrable offence), or r.1.20KC and r.1.20KD (significant criminal record for relevant offence) preventing approval are not relevant, and given that the Visa application was made prior to 18 November 2016, the requirement for the prospective spouse to consent to disclosure of any conviction for a relevant offence pursuant to cl.300.213 is not applicable. The time limits and requirements of. r.1.20J and the other considerations in r.120 are not enlivened in this case, Therefore, cl.300.213 is satisfied and the Tribunal is satisfied that the sponsorship referred to has been approved and is still in force.
37. Therefore, on the evidence before the Tribunal the requirements of cl.300.222 are met.

Have the parties met in person and are they known to each other personally?

38. *Clause 300.214* requires that the parties have met in person since each of them turned eighteen and that they are known to each other personally. Both were aged over eighteen (proofs provided). The evidence indicates that the parties originally commenced communicating electronically and met personally in 2015 in Vietnam. Movement records indicate that the sponsor visited Vietnam on several occasions since, spending time with the applicant. Therefore, at the time of application, the requirements of cl.300.214 were met.

Do the parties genuinely intend to marry?

39. *Clause 300.215* requires that at the time of application the parties have a genuine intention to marry, and that the marriage is intended to take place within the visa period. The parties met and commenced communicating and in June 2015, whilst the sponsor was visiting Vietnam, the sponsor became pregnant and they decided to get engaged. They did so on 11 July 2015. Approximately 30 relatives from both families attended the engagement. The sponsor's mother, her older sister from Australia and her siblings in Vietnam attended the engagement and spent time together.
40. The family returned to Australia on 20 July 2015. The sponsor was pregnant and the parties intended to marry as soon as the applicant was permitted to emigrate to Australia. DNA tests provided dated 20 February 2017 confirm that the applicant is the father of the sponsor's second child born in early February 2016.
41. At the time of application the Tribunal is satisfied that the parties had a genuine intention to ultimately marry and that the applicant satisfies the requirements of cl.300.215(a). The proposed date for the marriage is within the visa period as required by cl.300.215(b). Therefore, the requirements of cl.300.215 are met.

Do the parties genuinely intend to live together?

42. *Clause 300.216* requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). While it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.

43. Regulation 1.1 5A(3) considerations as to the intention of the parties

44. In order to assist in determining the parties intentions at the time of application. The considerations in regulation 1.1 5A(3) based on the evidence are as follows:

Nature of persons' commitment to each other including:

- (i) the duration of the relationship; and
- (ii) The length of time during which the persons have lived together; and
- (iii) The degree of companionship and emotional support that the persons draw from each other; and
- (iv) Whether the persons see the relationship as a long-term one.

The parties claim to have met and first communicated on 27 March 2015 on a website, first met personally on 11 June 2015 and were engaged on 11 July 2015 - the sponsor then returned to Australia on 19 July 2015.

The parties claim to have stayed together in an hotel one week between 12 /7/2015 and 19/7/2015. The sponsor returned to Australia 20 July 2015. The parties did not marry during the period or on the date which had been confirmed by the civil marriage celebrant. The delegate considered this was a very short space of time to make a lifelong commitment. Later evidence confirms that the parties have had a child together. The oral evidence also indicated that they see themselves and the two children as a family.

A copy of the delegate's decision was provided by the parties to the Tribunal. The Tribunal may accept some of the observations and evidence before the delegate. The Tribunal notes that the Delegate has analysed the fact that engagement was not according to the Vietnamese tradition which is important in that culture as it represents the union of two people and joining of two families where the parents are able to publicly announce and others to acknowledge that their daughter has been sought as a marriage partner. In the petition the ceremony involves relatives and various blessings for the deceased to bless the union. In addition, the applicant's father did not attend the engagement but the applicant claimed that his father had a stroke and was in hospital and could not attend. He also said that the parties and their daughters travelled to see the applicant's father who was in hospital. There are engagement photos and members of both families were at the engagement. The Tribunal accepts these matters.

On the basis of the whole of the evidence, the Tribunal is satisfied that the parties have always intended to marry which was ultimately precipitated by the fact that they had a child.

Financial aspects of the relationship including

- (i) any joint ownership of real estate or other major assets; and
- (ii) any joint liabilities; and
- (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
- (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
- (v) the basis of any sharing of day-to-day household expenses; and
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The applicant works as a hairdresser in Vietnam in his business and the sponsor runs a hairdressing business in Australia. It is their intention that in the future, the parties work together in the sponsor's business in Australia.

There is no evidence that the parties had or have joint finances or commitments or other financial involvement together. Given that they live in different countries the Tribunal attaches little weight to this criterion.

Nature of the household including:

- (i) any joint responsibility for the care and support of children; and
- (ii) the living arrangements of the persons; and
- (iii) any sharing of the responsibility for housework and

Given that the parties live in different countries, at the date of application they had spent approximately five weeks in each other's company since first meeting and and cohabitated for one week in an hotel after the engagement the issue of the nature of the household is a matter to which the Tribunal attaches little weight. The parties have legal and financial responsibilities towards their child.

Social aspects of the relationship including:

- (i) whether the persons represent themselves to other people as being married to each other; and
- (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
- (iii) any basis on which the persons plan and undertake joint social activities; and

The parties have submitted photographs of their engagement in 2015 and of some social activities with their families including the engagement and reception. They have also submitted other photographs of times which they have spent together. The various documents from witnesses in support of the relationship have been considered by the Tribunal. The Tribunal accepts on the evidence available, that the parties represented themselves as a couple to friends and family at the date of application and still do so.

The Tribunal is satisfied in relation to these matters.

Findings:

45. Based on the totality of the evidence before it outlined above including the considerations and the degree to which the r.1.15A(3) factors may be applied to determine a future intention, the Tribunal finds that the parties had a genuine intention to live together as spouses at time of application and which continues at

time of decision and have a mutual commitment to a shared life when they are married to the exclusion of all others, that they consider the relationship genuine and continuing and that they intend to live together and not live separately and apart on a permanent basis.

46. On the basis of the above the Tribunal is satisfied that at the time of the visa application the parties genuinely intended to live together as spouses, and therefore cl.300.216 is met.

Do the parties continue to meet time of application requirements?

47. Clause 300.221 requires that at the time of decision, the visa applicant continues to satisfy the criteria in cl.300.211, 300.214, 300.215 and 300.216. That is, that visa applicant intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen; that the parties have met and are known to each other personally; that the parties genuinely intend to marry and intend to do so during the visa period; and that the parties genuinely intend to live together as spouses. The evidence and discussion in relation to this appear in paragraphs 8-32 of this decision and will not be repeated here. On the basis of the evidence before it, the Tribunal finds that the applicant continues to satisfy clauses 300.211, 300.214, 300.215, and 300.216 at time of decision. Accordingly, cl.300.221 is met.
48. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

49. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:
- cl.300.21 of Schedule 2 to the Regulations
 - cl.300.22 of Schedule 2 to the Regulations

Carmel Morfuni
Member